



**SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

NOTICE TO THE PROFESSION

UPCOMING RULE AMENDMENT – RULE 58 – APPEALS IN THE TRIAL DIVISION

The Rules Committee of the Trial Division of the Supreme Court recently approved an amendment to Rule 58 of the *Rules of the Supreme Court, 1986*. The amendment will be published in the November 4, 2016 edition of the *Newfoundland and Labrador Gazette* and will be in force on November 7, 2016.

Prior to the amendment, rule 58 provided simply that Rule 57, the rule previously governing appeals in the Court of Appeal, applied to appeals in the Trial Division (General Division), with any necessary modifications. The new Rule 58 provides a distinct procedure for appeals made to the Trial Division. An overview of the significant changes is provided below.

Notably, where a statute prescribes a procedure different from that set out in Rule 58, the procedure in the statute governs. Furthermore, where there is a gap in the procedure set out in this rule, Rules 1-4 or the rules in Part I may be applied to appeals, with any necessary modifications.

(1) “Decision-making authority”

Instead of the terms “court appealed from” and “tribunal”, the new rule employs the term “decision-making authority”, which is defined as

... any person or body, from whom an appeal lies to the Court, including any court, tribunal, board, commission, committee, minister, public official, or other public or governmental agency or authority, including the Lieutenant-Governor in Council.

(See rule 58.01(e).)

(2) Leave to appeal still required

The new Rule 58 maintains the requirement that a person must seek leave to appeal where: (a) the person intends to appeal a decision made in an uncompleted matter; (b) the person intends to appeal a decision which was made by consent; (c) the only portion of a decision the person

intends to appeal relates to costs; or (d) a statute requires that the person seek leave of the Court prior to starting an appeal (see rule 58.03(1)).

Where leave is required, a person must file a Notice of Appeal with an application for leave to appeal attached. The application for leave to appeal must be prepared in accordance with the requirements for making an interlocutory application set out in Rule 29. The Notice of Appeal and the application for leave must be served on each respondent, the decision-making authority and any other person who must be served under a statute within 10 days of the filing of the Notice of Appeal. Each respondent must be served by personal service in accordance with 6.02 or 6.03.

Leave may be granted where the judge is “satisfied that the interests of justice require that leave be granted”.

(3) Appeal commenced by filing Notice of Appeal

Where no leave to appeal is required, an appeal is commenced by filing a Notice of Appeal. The new rule requires that the Notice:

- (a) specify the decision and decision-making authority appealed from, the date the decision was filed or made, the file number on the decision, and the neutral citation, if any;
- (b) describe the portion of the decision under appeal, if only a portion is being appealed;
- (c) set out the grounds of appeal;
- (d) state the relief, disposition, or order requested;
- (e) provide the name, postal address, email address, and telephone number of the appellant;
- (f) if known, provide the names, postal address, email address and telephone number of the persons being served with the Notice of Appeal, or their solicitors;
- (g) indicate whether a publication ban is in effect;
- (h) if the appellant is requesting that the appeal be expedited state the reason for the request; and
- (i) if applicable, state that the appeal involves the custody of, access to, protection of, support for, or responsibility for a child. (See rule 58.04(2))

Where there is a concern that providing the contact information required could lead to a risk of harm to a party or a child, the appellant may designate an alternate person to receive service on

the appellant's behalf, and provide the information regarding the appellant to the Court in a separate envelope marked "Confidential" or get directions from the Court. (See rule 58.04(3))

The Notice of Appeal must be served on each respondent, the decision-making authority, and any other person who must be served under statute within 10 days of the Notice of Appeal being filed. Respondents must be personally served in accordance with rules 6.02 or 6.03.

The rule clarifies that a decision-making authority served under this rule is not a respondent but may participate in the appeal to provide the Court with information regarding its function and processes or to any further extent permitted by a judge.

(4) Staying the decision under appeal

Like Rule 57, Rule 58 provides that an appellant may, after filing a Notice of Appeal, make an application for an order staying the decision under appeal pending the disposition of the appeal. The application must be made in accordance with the procedure for making an interlocutory application set out in Rule 29. (See rule 58.06.)

(5) Raising additional issues (cross-appeals)

Where the respondent wishes to argue any of the following points on the appeal, they must file and serve a Notice of Cross-Appeal: the decision appealed from should be varied; the decision appealed from should be affirmed on grounds other than those given by the decision-making authority appealed from; or the respondent is entitled to a different disposition or different relief than that given in the decision appealed from.

If the main appeal is discontinued or deemed abandoned, the cross-appellant must file and serve a Notice of Election to Proceed within 30 days after receiving notice that the appeal has been discontinued or deemed abandoned if they wish to proceed with the cross-appeal. Otherwise, the cross-appeal is deemed abandoned. (See rule 58.07.)

(6) Responsibility for filing "record"

Under Rule 57, the appellant is responsible for filing an "appeal book" which contains the record of the proceeding in the tribunal or court appealed from. Under the new Rule 58, responsibility for filing the record of the proceedings before the decision-making authority lies with the decision-making authority (see rule 58.09). The record must be filed within 30 days of the receipt of the Notice of Appeal by the decision-making authority.

The record must include an "official sound recording" of the proceeding where the proceedings were sound recorded in accordance with the *Recording of Evidence Act*.

(7) Preparing the transcript

Where the decision-making authority appealed from provides, as part of the record, an "official sound recording" of the evidence, the appellant must, within 10 days of its receipt: (a) arrange for the preparation of a transcript of the portion of the official sound recording necessary to

enable the issues on appeal to be determined; and (b) advise each party in writing what arrangements have been made under subrule (1)(a), including which portion of the official sound recording is being transcribed. If a respondent believes that a further portion of the sound recording should be transcribed, the respondent must make arrangements to prepare for this transcription, or request a case management meeting to discuss the issue with the other part(y/ies) and a judge. (See rule 58.10(1))

The appellant must file and serve the transcript within 60 days of receiving the official sound recording from the decision-making authority. If the respondent has prepared any additional portion of the transcript, they must file same within 10 days of receiving the transcript prepared by the appellant.

Any of the parties to an appeal may request a case management meeting to get directions from a judge regarding the preparation of the transcript.

The appellant may, where a judge permits or the parties agree, prepare a transcript from an unofficial sound recording of the evidence.

(8) Filing Appeal Briefs

The appellant must file two copies of a brief with the Court and serve a copy on the other part(y/ies) within either: 30 days of the date on which the decision-making authority served the record upon the appellant, if no transcript is required under rule 58.10; or 30 days of the date on which the transcript is filed, if a transcript is required or otherwise prepared under rule 58.10. (See rule 58.11)

The respondent then has 30 days to file their appeal brief. Rule 58.11 sets out the requirements and format for an appeal brief.

(9) Resolving Pre/Post Hearing Issues

A party to an appeal or a person who received a Notice of Appeal may, at any time after the commencement of an appeal, request that a case management meeting be held for any one or more of the following purposes:

- (a) achieving the efficient use of Court resources and promoting access to the Court in a timely and cost-effective manner;
- (b) attempting to refine the issues on the appeal;
- (c) determining the appropriateness of ordering a settlement conference or mediation;
- (d) providing directions regarding the preparation of the appeal record;
- (e) setting deadlines;
- (f) appointing the time, date, and place for the hearing of the appeal;

(g) providing directions to the decision-making authority regarding its right to participate in the appeal; and

(h) providing directions and resolving procedural questions. (See rule 58.13(1).)

Parties may also make an application at any time to resolve any issue arising on the appeal.

(10) Setting a Hearing Date

Under the new Rule 58, appeal hearing dates can be set by joint request of the parties (by completing form 58.14A) or by requesting a case management meeting to ask that a judge set a date. A party may only request a hearing date at a case management meeting where they have filed an appeal brief. (See rule 58.14.)

(11) Deemed Abandonment

Rule 58.15 provides that where a request for a hearing date has not been made within 12 months after filing the Notice of Appeal, an appellant will be given 30 days' notice of a deemed abandonment. Within that 30 day period, the appellant may request a case management meeting to seek directions regarding the conduct of the appeal. The judge presiding at the case management meeting may set deadlines for the next steps in the proceeding, adjourn the appeal indefinitely, or confirm the abandonment of the appeal.

(12) New evidence on appeal

Rule 58.16 sets out the procedure for introducing new evidence on appeal. Parties seeking to introduce new evidence must make an interlocutory application, in accordance with Rule 29. New evidence may be permitted by a judge after considering the following factors: whether, by due diligence, the evidence could have been tendered in the proceeding appealed from; the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal; the reliability of the evidence; whether the evidence, if believed, could reasonably have affected the result; and any other relevant factor.

(13) The Hearing of the Appeal

Rule 58.17 sets out the Court's powers on an appeal. While appeals will normally be conducted by reviewing the record of the proceedings before the decision-making authority, a judge may also: direct the rehearing of witnesses, the retaking of evidence, or the taking of further and other evidence by the decision-making authority; require the report of all evidence taken by the decision-making authority; require the production and examination of a witness already examined or of persons who have not been already examined; and refer the proceeding back to the decision-making authority for further consideration in whole or in part.

At the conclusion of the appeal, the presiding judge may: dismiss the appeal; confirm or reverse the decision of the court or tribunal; alter, amend, or modify the decision; make an order that is just; and make an order as to costs.

November 2, 2016

If you have any questions in relation to this matter, please contact the Court's Legal Officer, André Clair, at (709) 729-4743 or andreclair@supreme.court.nl.ca.

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